MARTIN P. GOLDING

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PHILOSOPHY OF LAW

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To My Mother

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FOUNDATIONS OF PHILOSOPHY

Many of the problems of philosophy are of such broad relevance to human concerns, and so complex in their ramifications, that they are, in one form or another, perennially present. Though in the course of time they yield in part to philosophical inquiry, they may need to be rethought by each age in the light of its broader scientific knowledge and deepened ethical and religious experience. Better solutions are found by more refined and rigorous methods. Thus, one who approaches the study of philosophy in the hope of understanding the best of what it affords will look for both fundamental issues and contemporary achievements.

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Elizabth Beardsley / Monroe Beardsley

PREFACE

The field of legal philosophy, which, with a few notable exceptions, was recently cultivated mainly within the technical confines of the law school or as a sub-branch of ethics and political philosophy, has experienced a considerable enlivening in the past two decades in the English-speaking world. Aside from the appearance of important books and articles, there has been an expansion of course offerings in the philosophy of law on both the undergraduate and graduate levels and also an enriching of the "jurisprudence" syllabus in law schools. I hope, with this little book, to contribute toward these trends.

My work on this book was well under way, only to be interrupted by the events that shook the academic world, especially Columbia University, in 1968. It was some time before I was able to turn my mind back to sustained scholarly work and bring my task to completion. It is possible that this book would have been rather different had it been produced sooner. Whether the longer gestation period improved the result, I do not have the psychological distance to judge. At any rate, I am more than ever convinced of the intellectual and practical significance of the subject.

My aim has been to introduce the student to legal philosophy and to stimulate his own thinking. Naturally, I would be gratified if the expert in the field also finds a few novelties here and there. One of the problems I faced was the selection of topics for coverage. I am not entirely confident that my solution was correct or that the proper balance was finally given to the matters herein considered. Many subjects had to be excised because of the limitation of space. The most difficult task, however, was that of compression, but I trust that clarity did not suffer too much in the process. I also regret that I was unable to take account of a number of important works (some are cited in the bibliography) which appeared in the course of the writing.

Parts of Chapter 3 first appeared in my article, "Private Right and the Limits of Law," *Philosophy East and West,* 21 (1971), 375–88, and I thank the editor and the University of Hawaii Press for permission to reprint them here. I also took up the subject of Chapter 6 first in an article, "Preliminaries to the Study of Procedural Justice," in Graham Hughes (ed.), *Law, Reason, and Justice* (1969), 71–100. This has now been considerably rewritten, but I wish to thank the editor and the New York University Press for permission to reprint whatever remains of the original.

My thanks go to Elizabeth and Monroe Beardsley, two angelic beings, for their patience and editorial advice. I also express my appreciation to my daughter Shulamith for her assistance with the proofreading. Special thanks go to my wife, whose help I cannot even begin to describe. Without her encouragement (and nagging), this book would still be undone.

M. P. G.

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Introduction: The Scope of Legal Philosophy

The setting of Plato's dialogue *Crito* is the following: Socrates has been convicted of the crime of corrupting the youth of Athens by teaching an impious doctrine about the gods. For this, he has been sentenced to death by poison. He is now in prison awaiting the time at which he must drink the fatal cup. His friend and student Crito comes to visit him and explains that a "jailbreak" is all arranged. Crito offers various reasons as to why Socrates should escape. But is it right? asks Socrates. Is it right for someone who has been convicted of a crime—even if he believes his conviction was unjust—to avoid his punishment? More generally, is there an obligation to obey the law, and what can be the basis for such an obligation?

This dialogue illustrates the fact that the field of the philosophy of law overlaps other branches of philosophy. The *Crito* is not only one of the classics of legal philosophy; it is also one of the classics of ethics and political and social philosophy. The same holds for works by other writers—for instance, Hobbes' *Leviathan*. There are no sharp lines of demarcation to the philosophy of law. Certain problems are common to all these subjects, though they are often dealt with in legal philosophy

from a narrower perspective. This perspective also holds, and perhaps even more narrowly, for many works on "jurisprudence" which are devoted to explaining the basic doctrines and principles of a given legal system. These works are nevertheless of philosophical interest. Still, because of the ground they have in common, ethics and political and social philosophy have a great deal to learn from philosophical inquiry into law. The study of moral reasoning, for example, can be enriched by the study of legal reasoning.

The philosophy of law also shares another feature with the above-mentioned branches. It deals with two kinds of question: normative (or justificatory) and analytic (or conceptual). Plato's *Crito* provides an example of the first kind; it asks whether a certain act (or type of act) is right. His dialogue *Euthyphro* provides an example of a treatment of the second kind of question. In that dialogue Socrates engages Euthyphro in a discussion of the definition of "piety." Although some alleged instances of pious actions are mentioned, the interlocutors do not consider whether or not they really are pious. Instead, they are concerned with what piety is; they attempt to analyze the concept of piety, to explicate what the word means. Legal philosophers, too, answer questions about whether something is good, right, or just and also attempt to give analyses of concepts and definitions of various terms.

I shall now supply a very brief account of some of the main problems of legal philosophy. Not all of them will be taken up in this book, partly because of limitations of space and partly because they can be just as appropriately treated by works in other branches of philosophy. Some of them are discussed in other volumes in this series.

Perhaps the foremost of the problems of legal philosophy is the analysis of the concept of law. What is law? What does it mean to say that a legal system exists in a society? We shall devote the next chapter to identifying the issues of which this problem is comprised. In the second chapter various theories of the nature of law are given a critical exposition. One of the basic bones of contention is whether there is a necessary link between law and morality. Do the criteria for the existence of law also include a moral element? Can an unjust law be a valid law? These questions, important in their own right, also bear upon the analysis of the concept of legal obligation. Laws, typically, impose obligations to act or not act in a certain way. How shall legal obligation be understood: is it simply a question of force?

It is only a short step from this issue to the normative questions of whether, and under what conditions, there is a moral obligation to obey the law and whether disobedience is ever justified. Perhaps even more fundamental, however, is what justifies law in the first place. Why should a society have laws? This, of course, is not a question for the legal

philosopher alone, but also for the political and social philosopher. It touches the very basic functions of politically organized community, many of which can be realized only through the instrumentality of law. In answering it, philosophers have invoked broad generalizations about human nature and social relationships. (Hobbes, for example, maintained that the state is necessary in order to curb innate human aggressiveness, and that laws provide the common standards of conduct without which social life would be impossible.) In this book we shall be concerned with the matters mentioned in this paragraph only to the extent that they are involved in the debate over the analysis of the concept of law.

Whether or not there is a necessary link between law and morality, it is a fact that we do pass judgment on the goodness or justness of laws. Newspaper editorials bombard us daily and Sunday with their judgments on some proposal in the legislative hopper. But what are the grounds for the evaluation of laws and, also, of the way they are administered? This is, ultimately, a normative question about the exercise of public power, and it is obviously not the exclusive province of the legal philosopher either, except insofar as he may be expected to bring to bear on it a closer attention to the actual operations and contents of legal systems. As one gets to evaluating particular laws, or even particular branches of law, it is clear that responsible evaluation presupposes social knowledge of an empirical kind, although there are difficult questions about how this knowledge is to be applied in the making of evaluations. The problem of evaluation also raises the more general one of what the aims of the law should be. Any concrete solution requires an examination of various interests, individual and social (e.g., security, economic welfare, etc.), and their critical assessment and ranking. In these connections, the legal philosopher will be concerned with problems of "institutional design," specifically with how legal institutions and agencies should be designed to achieve the aims of the law. There are numerous problems of this sort. We shall take up one of them, albeit on a theoretical level, in the last chapter.

If the philosophy of law is concerned with what the aims of law should be (and also, of course, with what the law can actually *do*), it must also concern itself with the permissible scope of the law, with its limits. Are there spheres of activity that are "not the law's business"? This is the ancient but ever new issue of authority and individual freedom, an issue which, to be sure, arises outside the legal context but which arises with particular sharpness for law, especially in the modern state. Can we formulate a principle that sets limits to the use of legal compulsion? The debate over this question is the subject of the third chapter of this book. The heart of the matter involves the protected rights that individuals should have.

The issue of standards for the critical evaluation of laws and legal institutions has an important place in the study of judicial decision making. Judges interpret and apply the law. They also make law. Anyone who has ever read a judicial opinion, which is intended as a justification of the decision in a case, will immediately see that the opinion represents a more or less elaborate reasoning process. But what are good reasons for a decision, and what makes an opinion well-reasoned? Complex matters of both a normative and analytical sort arise here. Judicial reasoning is like moral reasoning in many respects, yet it operates under the special constraints of the legal system and its aims. These likenesses and differences are topics for detailed investigation. Precedent, for example, might play a role in moral reasoning, but it certainly plays a role in judicial reasoning in most, perhaps all, systems. The idea of precedent is grist for the legal philosopher's analytical mill. Of equal significance are the normative questions of why, and to what extent, precedent ought to be followed. These large topics are not covered in this book, but the subject matter of the sixth chapter does have relevance to them.

The law employs many notable concepts in its formulation of legal rules and doctrines and in their further elaboration by judicial reasoning —for example, the concepts of property, persons, privacy, rights, duties, contract, and causation. One of the classic problems of the analytic side of legal philosophy, and one that is given extensive treatment in works on jurisprudence, concerns the extent to which certain of the concepts employed in law are reducible to others and how various concepts are logically or functionally related to others in judicial reasoning. Clearly, the analysis of at least some of the above concepts, and the justification of rules or doctrines that use them, are of interest to other branches of philosophy, too. Limitations of space preclude our taking up these topics in this book, although a little will be said about rights and privacy in Chapter Three.

Legal philosophy also overlaps a branch of philosophy which hitherto has not been mentioned—namely, philosophical psychology or philosophy of mind. Again, however, it treats its problems from a special point of view. These problems arise because various legal rules and doctrines employ concepts that have to do with modes of action and with mental states and events. For instance, in the civil law a person might be held liable for some damage which resulted from his negligent act; and in the criminal law the grade of an offense might depend on whether or not it was committed intentionally. So-called mental concepts are part and parcel of questions of the existence and extent of liability, civil and criminal, and the analysis of the notions of act, omission, motive, intention, etc. has been pursued with renewed vigor in recent years.

What should the basis of criminal liability be and when should some-

one be excused from punishment? This is the vexing issue of responsibility and the relationship that responsibility in the law should have to moral responsibility. Can we really distinguish between responsible and nonresponsible offenders, anyway? But it is not only important for the legal philosopher to examine the mental conditions that constitute grounds for an excuse; he must also inquire into why excuses should be allowed in the first place; for example, what is legal insanity, and should insanity be admitted as a defense? We shall not be able to go into the analysis of mental concepts in the law and the reasons for excuses. But we shall devote two chapters to the question of the justification of punishment. Why should we punish at all? The main answers will be critically examined.

Finally, there is the subject of justice. There are so many facets to this (e.g., political justice, economic justice, justice in commercial dealings, etc.) that I shall not attempt to describe them here. It is obvious that the subject of justice is not the private preserve of the legal philosopher, although justice is often regarded as the special virtue belonging to law. We shall only touch upon the question of the meaning of "just law" in a few places in this book. Justice in punishment, however, will occupy us considerably, and the last chapter is concerned with the role of procedural justice in the settlement of disputes.

But this is where we shall end and not where we start out. We shall begin with what I have called the foremost problem of legal philosophy, namely, the nature of law. Is it really true, as the young Alcibiades told the great Pericles, that no one really deserves praise unless he knowns what a law is (Xenophon, *Memorabilia,* I, ii)? I doubt it, although there have been praiseworthy attempts to elucidate what law is.

CHAPTER ONE

The Nature of Law: Problems

In this chapter we will be concerned with one of the central problems of legal philosophy, namely, the nature of law. Our interest will be focused, in particular, on delineating the issues that surround this topic rather than upon theories that have been developed in attempting to handle them. It is only after the issues have been exposed to view that we shall be in a position both to understand the arguments for the theories and to evaluate their adequacy.

The question "What is law?" has had a long history and many answers have been given to it. Many of these, however, are not alternative answers to the same question, but answers to different questions about the nature of law.[1] This is hardly surprising, for law is a complex phenomenon whose elements may be examined from a variety of perspectives and interests. In this respect, the history of the analysis of the nature of law is not unlike that of other fields of philosophical inquiry in which complex phenomena (e.g., science, history, and art) are analyzed. Our task in this chapter is, in effect, to break down this question into a set of questions which formulate the issues inherent in the problem of the nature

[1] See Richard Wollheim, "The Nature of Law," *Political Studies*, 2 (1954), 128–44.

of law. I shall shortly develop a heuristic device that will enable us to do this in a systematic way.

THE DEFINITION OF "LAW"

In asking "What is law?"—whatever the complexities this question contains or conceals—the philosopher is most of all seeking to define "law" or analyze the concept of law. In traditional terms, he would be said to be seeking the *essence* of law. What this means may be understood by considering a classical example for purposes of illustration: the nature of man. In asking what the nature of man is, we are seeking those qualities that are necessarily shared by all humans. According to an ancient view (whose correctness is of no concern to us), these are rationality and animality. We may think of these qualities as elements that make up the notion of humanity. Alternatively, we may say that the term "human" is synonymous with the phrase "rational animal." Whichever way we choose to look at the matter, according to this view a statement of the form

X is human

(e.g., "John is human") is true if, and only if, the conjunction of statements of the following forms is true:

i] *X* is rational.
ii] *X* is an animal.

These two statement-forms give the set of necessary and sufficient conditions for the truth of a statement of the form "*X* is human." This is equivalent to saying that rationality and animality are the "essence" of humanity.

Analogously to this illustration, the attempt to define "law" or analyze the concept of law, in the sense of specifying its essence, is a search for the set of qualities that are necessary and sufficient to characterize law. That is to say, there is some form of statement containing the word "law," or some closely related term such as "legal," for which we wish to specify the set of statements each of which is necessary for its truth and which together are jointly sufficient for its truth. Now, in undertaking such an inquiry, it is useful to select for initial examination a form of statement which provides a fruitful focus of attention and which helps us to uncover the various ramifications of the problem of the nature of law. The form we shall consider is

A legal system exists in *S*

where *S* refers to any given society. In attempting to supply the neces-

sary and sufficient conditions for assertions of this form, we shall be able to uncover, in an orderly manner, the complex of questions that are implicit in asking "What is law?" They are offshoots of a central theme.

The word "law" is, of course, used in a variety of contexts. It is used, for example, to refer to *a* law (a rule of law) and to *the* law (the laws that prevail in a given society). The explication of such uses is an important part of the problem of the nature of law, and this task arises as a special topic under the approach we are adopting. But "law" is also used to refer to a certain kind of social institution, and it is this rich use to which statements of the form "A legal system exists in *S*" are particularly related. We shall, in effect, be attempting to elucidate what is meant in saying that *a legal system exists in a society* or (to put it in other words) to analyze the concept of the existence of a legal system. If we can supply the necessary and sufficient conditions for the truth of statements of the selected form, we shall have come pretty close, at least, to specifying the essence of law. It should be kept in mind, however, that our primary aim in this chapter is to delineate the issues rather than the solutions to the problem.

It is important here to take note of a potential difficulty. It may well be the case that there is *no* essence of a legal system in the sense of a single set (or, more exactly, a single scheme) of individually necessary and jointly sufficient conditions for the truth of "A legal system exists in *S*." There may instead be several different, though overlapping, sets of sufficient conditions. In other words, there may be more than one way for something to qualify as a legal system. Moreover, as has been argued, the existence of a legal system may be a matter of degree, and there may also be borderline cases of legal systems. Some legal theorists have made even stronger claims than any of these. Given the many controversies over the nature of law, these writers have apparently concluded that there is no concept of law to be analyzed and that the expression "A legal system exists in *S*" has no clear meaning—unless such a meaning is *assigned* to it. The controversies over the nature of law, it is maintained, are just so many stipulations of definitions, proposals for the use of a phrase. Such proposals can at most be said to be convenient or inconvenient, not correct or incorrect.[2] This position we may call *conventionalism.*

We cannot settle these matters at present. It will be useful for us temporarily to proceed as if *essentialism* (the view that legal systems have an essence) is correct, and we shall attempt to supply the necessary and

[2] See Glanville Williams, "The Controversy Concerning the Word 'Law'," in P. Laslett, ed., *Philosophy, Politics and Society* (Oxford: Basil Blackwell, first series, 1956), 134–56. For a critique of Williams, see E. Gellner, "Contemporary Thought and Politics," *Philosophy,* 32 (1957), 353 ff. See also Herbert Morris, "Verbal Disputes and the Legal Philosophy of John Austin," *U.C.L.A. Law Rev.,* 7 (1960), 27–56.

sufficient conditions for assertions of the form "A legal system exists in *S*." The disagreement between the essentialist and conventionalist approaches will recur at a number of points in this chapter. I shall later indicate the limited kinds of context in which it would be appropriate to stipulate a meaning for "A legal system exists in *S*" (and other related expressions). Suffice it to say at present that even if essentialism is wrong, it does not follow that conventionalism is right.

THE ELEMENTS OF LEGAL SYSTEMS

I now turn to the elucidation of what it means to say that a legal system exists in a society. In order to get clues on this, let us suppose that we are members of a party of anthropologists studying the communal life of a tribe of South Sea Islanders. We plan ultimately to write a book about this society, describing therein its economy, its religious beliefs and practices, the structure and functions of the family, and so on. Included also will be a chapter on the law of this community, if there is any. Now in order to carry out a systematic investigation, we must have at least a rough idea of the data that would be relevant to it. That is, we must know, broadly, what to look for, although we cannot be sure that we will find it.

Our first step, then, is to formulate in this light specific subjects for inquiry. A number immediately suggest themselves. For example, mindful of the view of many historians that dispute settlement is one of the earliest forms of law, we would be interested in how disputes are settled in our island community. Is there an agency, a social mechanism or institution, for settling disputes between individuals? And if so, what kinds of dispute will it undertake to settle, or is it unrestricted in this respect? How are disputes brought to the attention of this agency for purposes of settlement? Is there an adjudicative procedure like that which prevails in our own courts, or do the procedures parallel the more informal methods of dispute settlement that one finds among a closely knit group of friends? Are the decisions of this agency regarded as being merely advisory, or is there some machinery for enforcing its decisions when a party to the dispute is recalcitrant? And so on. Clearly, on the basis of the knowledge we may already have about our Islanders—their "level" of social development—certain lines of inquiry will be immediately recognized as fruitful, while others will be eliminated.

The various questions that have been posed so far—the hypothetical lines of inquiry that call for investigation—are centered around the existence of a particular *agency* that engages in a particular activity, namely, the *settling of disputes*. We shall call such an agency a *jural agency* and such an activity a *jural activity*. The chapter on law in our book on the Islanders will contain a description of this agency, if the